

IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

CRIMINAL MISC.APPLICATION No 2766 of 1998

For Approval and Signature:

Hon'ble MR.JUSTICE H.R.SHELAT

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1. Whether Reporters of Local Papers may be allowed : YES
to see the judgements?
 2. To be referred to the Reporter or not? : NO
 3. Whether Their Lordships wish to see the fair copy : NO
of the judgement?
 4. Whether this case involves a substantial question : NO
of law as to the interpretation of the Constitution
of India, 1950 of any Order made thereunder?
 5. Whether it is to be circulated to the Civil Judge? : NO

ARUNBHAI NILKANTHRAI NANAVALI

Versus

SUDHIRBHAI PRABHUDAS THROUGH HIS POWER OF ATTORNEY
HOLDER Shri KISHORBHAI PRABHUDAS AND ANOTHER.

Appearance:

Mr. N.D. Nanavati & MR MT KIKANI for Petitioner
MR MJ DAGLI for Respondent No. 1
Ms. Katha Gajjar, APP for Respondent No. 2

CORAM : MR.JUSTICE H.R.SHELAT

Date of decision: 12/07/1999

CAV JUDGEMENT

The petitioner, against whom a Criminal Case No.
4060 of 1997 is filed in the Court of the Judicial
Magistrate (F.C.) at Bhavnagar, relating to the offence
punishable under Section 138 of the Negotiable
Instruments Act (hereinafter referred to as 'the Act'),
prays for setting aside the common order dt. 15.6.98
passed rejecting his applications, Ex. 6, 9 & 10,

quashing of the complaint, and his discharge etc.

2. The question of vital importance that arises for consideration is to which Bank (paying or collecting), the cheque is to be presented within 6 months or during its validity period for legally & validly initiation of criminal action under Sec. 138 of the Act ?

3. The facts, necessary for disposal of this application, may, in brief, be stated. The petitioner and opponent No.1, were having legal transactions. When account was settled, Rs. 1,00,000/- were found due to the opponent No.1 from the petitioner. The petitioner therefore, in order to fulfil his obligation to pay the amount, issued the cheque for Rs. 1,00,000/- on 24th January 1997. The cheque was drawn on the Branch of Veraval Mercantile Co-operative Bank Ltd, Veraval at Junagadh (for short, 'the paying Bank'). The opponent No.1 presented the cheque on 24th July 1997 at Bhavnagar Nagrik Sahakari Bank Ltd, at Bhavnagar (for short, 'the collecting Bank'). On the same day, the collecting Bank sent the cheque to the paying Bank, i.e., drawee at Junagadh. The cheque was received by the paying Bank on 28th July 1997. The cheque was on the same day returned on the ground that the account was closed. On receipt of the intimation that the cheque was dishonoured, the opponent No.1 on 11th August 1997, gave a notice to the petitioner calling upon him to make the payment. The payment, after the receipt of the notice, was not made. The opponent No.1, therefore, on 10th September 1997 filed the complaint being Cri.C. No. 4060/97 in the Court of the Chief Judicial Magistrate at Bhavnagar, which was later on assigned to the Judicial Magistrate (F.C.) at Bhavnagar for hearing and disposal in accordance with law. As the complaint was registered, summons against the petitioner was issued. After being served with the summons, the petitioner appeared before the Court of the Judicial Magistrate (F.C.) at Bhavnagar on 9th October 1997. Studying the allegation against him, he filed an application Ex.6 on 19th December 1997 requesting the court to discharge him holding that the court was having no jurisdiction. On 24th December 1997, another application Ex. 9 was also filed by the petitioner requesting the court to dismiss the complaint and discharge him as the cheque was not presented within 6 months, the period of its validity. Lastly on 21st January 1998, the petitioner presented the third application, Ex.10 requesting the court to discharge him under Section 245 (2) of the Criminal Procedure Code because the cheque was presented after the expiry of the period of 6 months. The learned Judicial Magistrate at

Bhavnagar heard all the three applications together and by a common order dated 15th June 1998, rejected all the three applications, mainly on the ground that the question of want of jurisdiction and bar of limitation owing to validity period of 6 months could be decided after the evidence was recorded in the case. Against that order, the present application is filed for the aforesaid relief.

4. On several grounds, the order, of the learned Judicial Magistrate, is assailed, but at the time of submissions before me, the learned advocate representing the petitioner tapered off his submissions confining to the only point relating to the presentment of a cheque. According to him, the cheque is required to be presented at the paying Bank (drawee) and not the collecting Bank. In this case, the cheque dated 24th January 1997 ought to have been presented at the paying Bank, within the period of 6 months, instead that the cheque was presented on 24th July 1997 at the collecting Bank. The said Bank forwarded the cheque to the paying Bank on the same day and the paying Bank received the same on 28th July 1997. When accordingly the cheque was presented to the paying Bank on 28th July 1997, it is clear that the cheque was presented after the expiry of 6 months period. The cheque had then become a stale cheque. When the cheque was, thus, presented to the paying Bank, after the expiry of the six months period, the complaint lodged relating to the offence punishable under Section 138 of the Act is, on that count, liable to be quashed, and the petitioner deserves a clear discharge. In reply to such submission, Mr. Dagli, the learned advocate for opponent No.1 has submitted that the cheque, if presented at the collecting Bank, it would be a proper and valid presentation in the eye of law. It is not necessary that the cheque has to be presented within 6 months at the paying Bank. Looking to the nature of money transactions, the holder of the cheque can present the cheque at the Bank with which he is having the account, and that collecting Bank would then send the cheque to the paying Bank for realization of the amount. If the contention of the petitioner is accepted, it would frustrate the realization of the amount and the drawer of the cheque committing wrong would go scot free. If the collecting Bank, to which the cheque is presented within the period of validity, or 6 months whichever is earlier, delays in sending the cheque, or even if there is no delay on its part, but delay on the part of the postal authority for one or another reason is caused in delivering the cheque to the paying Bank within time, the action to be taken against the defaulting party, i.e. drawer of the cheque under

Section 138 of the Act will be frustrated, which can never be the intention of the Parliament. The interpretation of Sec. 138 must therefore be meaningful promoting the object. Interpretation favouring the wrongdoer will certainly defeat the object of Sec. 138 of the Act, and that may grind down the faith of businessmen and others transacting through Banks.

5. Better, it would be to refer the relevant provision of the Act, before the rival contentions with regard to the presentment of the cheque is dealt with.

138. Dishonour of cheque for insufficiency, etc., of funds in the account.— Where any cheque drawn by a person on an account maintained by him with a banker for payment of any amount of money to another person from out of that account for the discharge, in whole or in part, of any debt or other liability, is returned by the bank unpaid, either because of the amount of money standing to the credit of that account is insufficient to honour the cheque or that it exceeds the amount arranged to be paid from that account by an agreement made with that bank, such person shall be deemed to have committed an offence and shall, without prejudice to any other provisions of this Act, be punished with imprisonment for a term which may extend to one year, or with fine which may extend to twice the amount of the cheque, or with both:

Provided that nothing contained in this section shall apply unless--

- (a) the cheque has been presented to the bank within a period of six months from the date on which it is drawn or within the period of its validity, whichever is earlier;
- (b) the payee or the holder in due course of the cheque, as the case may be, makes a demand for the payment of the said amount of money by giving a notice, in writing, to the drawer of the cheque, within fifteen days of the receipt of information by him from the bank regarding the return of the cheque as unpaid; and

(c) the drawer of such cheque fails to make
the payment of the said amount of money
to the payee or, as the case may be, to
the holder in due course of the cheque,
within fifteen days of the receipt of the
said notice."

Explanation. For the purposes of this section
"debt or other liability" means a legally
enforceable debt or other liability.

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142. "Cognizance of offences.____
Notwithstanding anything contained in the Code of
Criminal Procedure, 1973 (2 of 1974)--

(a) no Court shall take cognizance of any
offence punishable under Sec. 138 except
upon a complaint, in writing made by the
payee or, as the case may be, the holder
in due course of the cheque;

(b) such complaint is made within one month
of the date on which the cause of action
arises under Cl. (c) of the proviso to
Sec. 138;

(c) no Court inferior to that of a
Metropolitan Magistrate or a Judicial
Magistrate of the first class shall try
any offence punishable under Sec. 138."

A perusal of both the sections makes it clear that if the
cheque is issued for payment of money to another person
so as to discharge his obligation of clearing out the
legal debt, the same has to be presented within a period
of 6 months or within the period of its validity,
whichever is earlier at the bank on which it is drawn.
If accordingly, the cheque is presented and the same is
dishonoured, owing to insufficiency of fund or that it
exceeds the amount arranged to be paid from that account
by an agreement made with that bank, the payee or the
holder in due course of the cheque has to make a demand

for payment giving a notice in writing within 15 days of the receipt of the information from the Bank regarding the return of the cheque. If within 15 days of the receipt of the notice, the drawer fails to make the payment of the cheque, a complaint within one month thereof has to be filed. If accordingly, the cheque is not presented, or notice is not issued or the complaint is not filed, and any of the periods specified in the sections is allowed to expire or curtailed, and then the complaint is filed, the same cannot be entertained, it will be liable to be quashed for non-fulfilment of one or the another requirement of the abovestated provision.

6. In the case on hand, the cheque was entrusted to the collecting bank, on the last day of the 6 months period and the paying bank received the cheque on 28th July 1997 after the period of 6 months was over. The paying bank therefore refused to make the payment on the ground that the cheque had become stale, and secondly the drawer of the cheque had closed the account. As held in the case of NEPC Micon Ltd vs. Magma Leasing Ltd. (1999) 4 SCC 253, the meaning of the words "account closed" is that the cheque is returned as unpaid on the ground that the amount of money standing to the credit of that account is insufficient to honour the cheque and that would also attract Sec. 138. The crucial points raised for my consideration are, where the cheque is required to be presented, whether at the collecting Bank or at the paying Bank and whether presentment in this case is in consonance with Sec. 138 of the Act. It is pertinent to note that in the earlier portion of Section 138, the words "a banker", "returned by the bank unpaid", "with that bank" appear and then in Proviso (a) to that section, the words "to the bank" appear. It may be mentioned that for the sake of convenience, the words quoted are underlined in the Section reproduced hereinabove. Earlier Article 'a' and in later part Article 'the' are used in the provision. The same are indicative of the Bank qua presentment of a cheque. Article 'a' is called the 'indefinite article'. It does not point out any definite or particular person, place or thing. Article 'the' refers to some definite or particular place, person or thing. If a particular person, place or thing is referred earlier using article 'a' and subsequently the same place, person or thing is to be referred, the same would be referred to using article "the". Article "the" subsequently appearing envisions the same place, person or thing referred to earlier using article "A". In the earlier portion of Section 138 of the Act, the word "banker" is prefixed by article A and subsequently in the Proviso (a) to the said

sections, the word 'Bank' is prefixed by article "the". The expression "the Bank", therefore, unequivocally and without any ambiguity or confusion indicates that the Banker referred to earlier is envisaged in Proviso (a) to Sec. 138. Reading whole Section, no other construction is possible or emerges. In order to know which Bank is referred, the opening words and later on the aforesaid words "the Bank unpaid" and "with that bank" are the good, definite and sure guide. In the opening portion of Sec. 138, the cheque, drawer, account with, suffixing abovequoted words "a banker" are mentioned. Thereafter there is a mention about payment, account, discharge, liability and return of a cheque suffixing the abovequoted word "by the Bank" unpaid, and a little later about agreement is mentioned suffixing abovequoted words with "that Bank". All these words contemplate and indicate that the presentment of the cheque must be at the Bank on which the cheque is drawn, i.e. drawee or paying Bank. Subsequently, as mentioned hereinabove, the words "the bank" in Proviso (a) to Sec. 138 are used. Use of the Article "the" prefixing the word "bank" in Proviso (a) to Sec. 138, therefore, with all certainty and indubitably indicates the "Bank" referred to in the earlier portion of Sec. 138, viz., the Drawee or Paying Bank on which the cheque is drawn. I also for my such view find support in the decision of Punjab & Haryana High Court rendered in a case of Omprakash vs. Gurucharan Singh (1998) 92 Company Cases 398.

7. Further, I am of the view that Sections 138 of the Act, being the penal provision under which the defaulting party can be prosecuted, and if held guilty can be punished has to be interpreted strictly so that no one can ingeniously or insidiously or guilefully or strategically be prosecuted. The Proviso (a) to Section 138 mandates that the cheque has to be presented to the Bank and therefore the meaning of 'presentation' cannot be lost the sight of. The presentation must entail realisation of the amount or payment of the sum of the cheque. It is not a simple presentation, i.e. entrustment or a 'tender' bereft of payment, because Section 138 of the Act gives rise to the penal action when on the cheque being presented, the same is not found honourable for insufficient fund, or the amount of the cheque exceeds the amount to be paid from the account by an agreement made with that Bank, i.e. paying Bank. The cheque in view of this penal provision therefore must be presented within the period of its validity to the paying bank, namely the Bank on which the cheque is drawn because collecting bank cannot on receipt of the cheque make the payment or dishonour the cheque. It has to

forwarding the cheque to the paying Bank, collect the sum and then pay to the holder of the cheque or payee or onward transmit the intimation received. The collecting Bank is therefore the agent of the payee, and on his behalf it collects the money from paying Bank sending the cheque or receives intimation & informs the payee. In short, payment is made only when the cheque is received by the paying bank within 6 months or within the period of its validity. The cheque amount is realised by the payee when the cheque reaches the paying Bank within 6 months or within the period of validity; and if the paying bank receives after 6 months or period of validity expires, it does not pay holding that the cheque is a stale cheque. The presentation therefore entails realization of the sum only when the cheque is received by the paying Bank. When accordingly presentation entails payment or realization of cheque amount, the words "presented to the bank" appearing in Proviso (a) to Sec. 138 of the Act irresistably conveys that the presentment of the cheque is to be made within 6 months or within the period of validity at the paying Bank and not at the collecting Bank. If the cheque is received by the paying Bank after the expiry of the aforesaid period for whatever reason, the presentment of the cheque can be said to be late and de hors the law not fulfilling one of the requirements for initiation of criminal action. The presentation to the collecting Bank is therefore of no value. The fact of giving the cheque to the collecting bank can best be termed "entrustment" or "tender" for realisation of the sum presenting to the paying bank, and in no case it can be termed presentation.

8. For just and meaningful interpretation, other relevant provision of the Act can be looked at. One cannot overlook Section 72 of the Act. It provides that subject to the provisions of Section 84, a cheque must in order to charge the drawer be presented at the bank upon which it is drawn before the relation between the drawer and his banker has been altered to the prejudice of the drawer. This provision contemplates different contingencies & exigencies, one of which is the possibility of the closure of the account by the drawer of the cheque after the period of its currency or negotiability expires. The provision therefore dictates that the presentment of the cheque must be at the bank on which it is drawn for presentment at any other bank or branch will be an entrustment or a tender. The presentment of cheque at the bank on which it is drawn may be either in person or through collecting bank. This provision is also a pointer to the consequences that follow on failure to present the cheque at the

appropriate or specific bank or branch. For the application of Sec. 72, other conditions to fasten the drawer with liability must be satisfied, but mention & discussion about the same being foreign to the issue in question, it is not necessary to make a mention thereof & discuss in details. A conjoint reading of both the Sections 138 & 72 makes it abundantly clear that the cheque is required to be presented at the bank on which the same is drawn if the drawer is to be held liable. Of course, civil liability may remain alive, but the criminal liability would not, if the presentment is not made within 6 months or the period of validity at the bank on which the cheque is drawn. The word "presentment", therefore, serves no purpose if the cheque is presented at any other bank or branch as it amounts to "entrustment" or "tender" and not 'presentment'. In view of such emerging effect of the provisions of the Act, the cheque if presented at the collecting bank is not the presentment of the cheque within meaning of Section 138.

9. The learned advocate representing the opponent No.1 has drawn my attention to three authorities for anxious consideration. All the three authorities, being on different points, are not applicable. In the case of *Mallappa Sangappa Desai v. Laxmanappa Basappa Whoti* - 1 (1995) CCR 363, the High Court of Karnataka had to decide the issue whether the cheque can be presented again and again during the period of validity, if once the same is dishonoured. In that connection, it is held that the payee, in order to give an opportunity to the drawer to make good the deficiency, can present the cheque more than once for encashment and the notice should be issued within 15 days of the receipt of the information about the return of the cheque on the ground of 'insufficiency of fund' notwithstanding the fact that the cheque might have been returned earlier also with similar endorsement. The notice about the return of the cheque can be given on the first occasion or the payee may differ to give the notice and grant one or more than one opportunities to the drawer to make the payment by presenting the cheque again or in succession for the 2nd, or 3rd or 4th time and accordingly for further times, i.e., repeatedly but of course within the period of its validity and not beyond it, and then may even give notice selecting the last return of the cheque in sequence or series, not rendering the notice contrary to Sec. 138. The point about presentment of a cheque at a particular bank being not the issue before the High Court of Karnataka, and the decision is also not on the same point, it cannot be pressed into the services of the opponent No.1. For the same reason, the decision rendered by the Andhra Pradesh

High Court in the case of M/s. Syed Rasool & Sons, and others vs. M/s. Aildas & Company, and another - 1992 Criminal Law Journal 4048, cannot help the opponent No.1. Before the Madras High Court, in the case of K.S. Subbaraman vs. Iyyammal 1999 (2) Crimes 11, the question was not to which bank the cheque should be presented, but it was with regard to the question whether presentment was made within the period of 6 months. The cheque in that case was issued on 25th June 1993 and was presented at the collecting bank on 27th December 1993. Rejecting the contention that the cheque was presented two days late, it is held that on 25th December 1993 and 26th December 1993, the bank was closed owing to holidays and next working day was 27th December 1993. If accordingly, on the next working day when the bank re-opens after holidays the cheque is presented, it would amount to the presentment within its validity period, and the complaint if filed will be sustainable. What is therefore laid down is that if the period of 6 months or period of validity if expires on the day or during the period the bank is closed owing to holidays or weekly-off, the presentment of the cheque if made on the next working day when the bank re-opens, it will be the valid & effective presentation and not the presentation barred by the period of limitation provided in Sec. 138. Here, in this case, presentment at the paying bank is not delayed because of the holidays in the bank or the cheque was not presented on the next working day after the bank re-opened. When thus point to be determined, in this case, was the point foreign to the case before Madras High Court the decision rendered in K.S. Subbaraman's case (supra) is not applicable to the case on hand.

10. The learned advocate representing the opponent No.1 at this stage faced with such situation contends what should then be done by the payee of the cheque if the cheque is returned holding that it became a stale cheque or that the drawer of the cheque has closed the account. He, developing the contention, submits that there may be a delay on the part of the collecting bank in sending the cheque to the paying bank though tendered within the period of validity, or because of the delay on the part of the postal authority the cheque may reach the paying bank after the expiry of the period of validity, or 6 months as the case may be, the holder of the cheque in that case would be helpless. The contention must fail. In that case initiation of criminal action in view of non-fulfillment of the requirements of Sec. 138 of the Act would certainly be barred; but it will be open to the payee to initiate the civil action filing the suit for the recovery of the cheque amount subject to the law of

limitation. The Civil Court will certainly pass the decree if the case alleged in plaint is proved. The payee qua the recovery of the sum will not be helpless. It may however be stated that when the cheque is required to be presented at the paying bank before it becomes a stale cheque, the holder of the cheque or the payee has to present the cheque well in advance, considering the exigencies or contingencies or delay that is likely to occur on the part of the collecting bank or the postal authorities. He cannot wait till the last day of the period of validity for presentment of the cheque, because proviso (a) to Sec. 138 makes it abundantly clear that if presentment of a cheque is not made within 6 months from the date on which the cheque is drawn or within the period of its validity whichever is earlier, the cause to lodge the complaint does not subsist or live on, for in that case the offence cannot be said to have been constituted and payee or holder of a cheque loses his right if there be any to initiate criminal action.

11. In this case, presentment of the cheque to the paying bank is, in view of the abovestated dates, not made within 6 months of the date of the cheque. The presentment is late by four days. The cheque, therefore, became a stale cheque and the same was, therefore, bounced without honouring the same. As the presentment is not in consonance with Sec. 138 of the Act, and is late by 4 days, one of the essential requirements of Sec. 138 of the Act for initiating penal action is not satisfied. When that is so, the complaint lodged cannot be entertained, the same has to be quashed, and the petitioner, who is the accused, in that case, is required to be discharged. The learned Judicial Magistrate lost the sight of above stated law and fell into error in rejecting the applications Exhibits 8 & 10 despite the fact that he was, in view of the decision dated 21.1.1998 of this Court in Shaw Wallace & Co. vs. State of Gujarat in Criminal Revision Application No. 452/97, having the jurisdiction, as the cheque was entrusted to the Bank at Bhavnagar, & he received the intimation at Bhavnagar, and right in rejecting the application Ex.6.

12. For the aforesaid reasons, the cheque is required to be presented at the paying bank, i.e., drawee within the period of 6 months or the period of validity which ever is earlier for validly initiation of the criminal action i.e. lodging of the complaint against the drawer. When this is the only possible interpretation, it cannot be said that the faith of those dealing with others through bank will be frustrated. It is also not open to contend that the payee will be helpless. When in this

case the cheque is not presented at the paying bank within 6 months, the application is required to be allowed, and the complaint, being Criminal Case No. 4060 of 1997, being not tenable for want of non-subsistence of cause of action, is not only required to be quashed, but the petitioner also deserves a discharge, allowing the applications Exhibits No. 9 & 10. In the result, the application is partly allowed. The orders, below Exhibits No. 9 & 10, are hereby set aside. Both the applications are allowed, and the Criminal Case No. 4060 of 1997, pending on the file of Judicial Magistrate (F.C.) at Bhavnagar, is hereby quashed, and the petitioner is ordered to be discharged. The final order below application Ex.6 is maintained. Rule to the aforesaid extent is made absolute.

(rmr).